DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

AVERTING DISASTER: HOW TO TURN AROUND A RUNAWAY VERDICT*

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INTRODUCTION

Not long ago it was said that plaintiffs' lawyers knew they had made it when the jury returned a $1 million verdict. Now, they need at least a $ 10 million recovery to stand out. And, $10 million is a small amount compared to the $50 and $100 million awards that are routinely reported by the National Law Journal. You can no longer assume that the "runaway verdict" is a rare misfortune affecting only a few, unlucky colleagues. It happens altogether too often.

Fortunately, there are ways to maximize your chances of converting disaster to victory. These materials serve as a tool kit for in-house counsel in need of fixing a case gone awry in the trial court. They offer practical advice on how to lay the groundwork for a successful appeal and how to enhance your chances of reversal through effective appellate advocacy. In addition, they address the immediate business considerations that go with a big hit, such as how to obtain a stay of judgment and ways of dealing with public relations issues.

It is no secret that a successful appeal requires careful preparation. Be prepared! Use these materials to make sure that you are not caught off-guard by a runaway verdict.

I. PRE-LITIGATION STRATEGIES: LAYING THE GROUNDWORK FOR EVENTUAL SUCCESS

You are the general counsel of a Fortune 500 company. It is a beautiful, sunny day and you really appreciate having given up chasing billable hours to work for such a wonderful company. Then, the phone rings. The senior manager for risk management calls to tell you that an explosion has occurred at one of your plants, resulting in multiple deaths and numerous injuries. The press and, of course, parachute lawyers have caught wind of the explosion and have descended upon the sight. After taking a deep breath and longing for the old days of the billable hour, you realize that your company's success in defending against what is likely to be an onslaught of lawsuits is directly related to the decisions you make at this very initial point and time. You quickly must decide on how to gather the facts, how to protect the fact gathering, how the facts garnered will substantiate a defensible theory of the case, how to document the facts of the case, how to deal with public relations issues, and who is the person best situated to oversee this process.

These early decisions are critical to the success of an eventual appeal for the simple reason that any appeal is constrained by the evidentiary record and legal theories presented in the trial court. It does no good to bring in a brilliant appellate specialist after losing a big case at trial if the facts were not sufficiently documented to support his or her analysis. The ultimate legal theory, therefore, dictates in large part what facts you should pursue in the pre-trial investigation.

Some law firms offer "rapid response teams" to assist with the investigation of a disaster. These lawyers, who are familiar with the evidentiary standards that are necessary for establishing a successful defense, are prepared to travel to the scene of a disaster within hours of the occurrence. By combining their knowledge of the legal issues that will ultimately govern the case with investigative experience, they can make sure that key evidence is developed and preserved, thereby laying the groundwork for eventual success in an appellate court.

Conducting a pre-litigation investigation, however, is not without risk. Once litigation begins, the discovery of the internal, pre-litigation investigation and resulting reports often becomes an issue.

Generally, parties rely upon the work product doctrine to protect such investigations. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides:

> A party may obtain discovery of documents and tangible things… prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative…only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

See Fed. R. Civ. P. 26(b)(3). The work product doctrine protects a zone of privacy within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories. *See Western Trails, Inc. v. Camp Coast To Coast, Inc.*, 139 F.R.D. 4 (D.D.C. 1991); *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854,864 (D.C. Cir. 1980). The purpose of the doctrine is to protect the integrity of the adversary trial process by shielding adversaries' thoughts and plans concerning the case. *See Western Trails, Inc.* at 9. Although the work product doctrine is confined strictly to materials prepared in anticipation of litigation, it protects not only materials prepared by a party but also materials prepared by a representative of a party, including attorneys, consultants, agents, or investigators. *See Varel v. Banc One Capital Partners, Inc.*, No. CA3:93-CV-1614-R, 1997 U.S. Dist. Lexis 4711 (N.D. Tex. Feb. 25, 1997); *United States v. Nobles,* 422 U.S. 225, 228 (1975).

Rule 26(b)(3) does not require that a party formally file a lawsuit in order to avail itself of the protection of the work product doctrine. *See Raso v. CMC Equipment Rental, Inc.*, 154 F.R.D. 126 (E.D. Pa. 1994). The party opposing the discovery need only show that the documents were prepared or obtained because of the prospect of litigation, and not in the regular course of business. *See* Fed. R. Civ. P. 26(b)(3) Advisory Committee's Note ("materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by this section").

The fact that litigation might ensue, however, is not dispositive of the question of whether pre-litigation investigative reports are discoverable. Instead, the inquiry is a factual determination of the primary reason for creation of the requested documents. *See Nat'l. Union Fire Ins. Co. v. Murray Sheet Metal Co.,* 967 F.2d 980 (4th Cir. 1992)*; Binks Mfg. Co. v. Nat'l Presto Indust., Inc.* 709 F.2d 1109 (7th Cir. 1982); *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982); *Scott Paper Co. v. Ceilcote Co., Inc.*, 103 F.R.D. 591 (D. Me. 1984).

Simply anticipating that litigation may result from an event, therefore, does not automatically qualify an in-house report as work product. *See Soeder v. General Dynamics Corp.*, 90 F.R.D. 253 (D. Nev. 1980). For example, in *Soeder*, the defendant conducted an investigation following the crash of an aircraft it designed. *See id.* at 254. Defendant conceded that such reports are routinely prepared after such crashes. *See id.* at 255. Aside from the possibility of litigation, the court stated that the defendant could not argue against the many reasons why the defendant would have prepared the report in the ordinary course of business in its desire to improve its aircraft products, protect future pilots and passengers, guard against adverse publicity, and promote its own economic interests. *See id.* at 255. Consequently, the court ordered the defendant to produce the report to the opposing party. *See also Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1986). (concluding that the work product doctrine would not protect the risk management documents from discovery unless they were prepared in anticipation of litigation and were not prepared in the regular course of business);

While courts have shown an inclination to find pretrial investigation reports discoverable, the courts have stopped short of requiring production of prelitigation investigation reports that include the investigators mental impressions. *See Smith v. Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582 (S.D. Tex. 1996). *See also Duplan Corp. v. Moulinage et Retorderie de Chavanoz,* 509 F.2d 730, 734 (4th Cir. 1974) ("no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories"); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) ("unlike ordinary work product, opinion work product can not be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the material by alternative means without undue hardship").

What these cases show is that, even before litigation, counsel can advise the company how to pursue the requisite fact-finding investigation, how to shape the case, and simultaneously minimize the possibility of the pre-litigation investigation's findings making their way into the hands of adversary counsel.

II. THE TRIAL COURT: PRESERVING THE RECORD FOR APPEAL

A. Begin Preparing For The Appeal As Soon As You Get The Case.

Too often, lawyers make the mistake of considering the issues for appeal only after they have lost the case in the trial court. A lawyer who waits until receiving an adverse jury verdict before thinking of the appeal, however, likely has waived at least some arguments, perhaps even the best ones. To ensure that your case is in the best posture on appeal, you should prepare for the possibility of appeal during every stage of the litigation. Laying an early foundation for an eventual appeal is never a waste of resources. Even if there is never an appeal, it strengthens your position with respect to settlement or trial. If the case does not settle and things turn out badly at trial, it gives you the most flexibility in framing your request for a reversal.

One of the best ways of preparing for an appeal is to develop the "roadmap" for your case as early as possible. The most effective roadmap is a thorough written analysis addressing the legal theories of the case as well as all applicable standards and burdens of proof. For example, if you are representing the plaintiff, even before filing your complaint you should analyze the controlling authorities, then list each of the essential elements of your claims and the facts on which you will rely to satisfy them. You should anticipate the defenses that will be lodged and discuss your proposed rebuttal. If you are defending the case, you should conduct a similar analysis to make sure that you know from the start what defenses to plead in your answer and what evidence you will need to present to support them.

It pays to spend the time to produce a comprehensive written analysis early in the case because the effort will provide guidance, hopefully a checklist, later on when you are preparing your discovery requests, motions, pretrial order, witness outlines, exhibits, Rule 50 motions and, if necessary, your appeal. With the legal theories, standards and burden of proof memorialized in writing, you will have an easy reference to use throughout the case to make sure that you don't forget an important point. Such a memorandum is particularly

an easy reference to use throughout the case to make sure that you don't forget an important point. Such a memorandum is particularly helpful in a case that spans years with intermittent dormant periods.

The roadmap, of course, should be updated at each new stage of the litigation to include new developments of fact or law. Even with such updates, however, the initial analysis usually continues to provide the underlying structure for the development of the case for trial and any eventual appeal. Indeed, much of the analysis of controlling authorities in a well crafted initial "roadmap" can be copied verbatim into a summary judgment brief and then carried forward into the appellate brief when the time comes.

B. Make Sure That Your Pretrial Order Is Complete.

Under F.R.Civ.P. 16, the pretrial order supersedes the pleadings and "shall control the subsequent course of the action . . . ." It is important to remember that Rule 16 not only shapes the trial of a case by identifying witnesses and documents, it also serves to shape the issues on appeal. Courts have strictly construed Rule 16 to bar review of an issue that was omitted from the pretrial order. *See Miles v. Tennessee River Pulp and Paper Co.*, 862 F.2d 1525, 1529 (11th Cir. 1989). *See also Day v. Liberty Nat. Life Ins. Co.*, 122 F.3d 1012, 1016 n.5 (11th Cir. 1997) (noting "that it is the law of this circuit that a defendant can waive a potentially viable defense by failing to ensure that the issue is clearly preserved in the pretrial order"). It is important, therefore, to include all legal theories in the pretrial order.

B. Observe The Ten Commandments For Preserving The Record At Trial.

The trial of a case provides the most fertile ground for error. Unless the error is brought to the attention of the district court, however, it will not support a reversal. With rare exception, the federal Courts of Appeals adhere to the fundamental rule of appellate practice that a point not raised below is waived. *See e.g., Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 n. 9 (11th Cir. 1999) (stressing the limited application of the plain error doctrine).

While the types of possible errors at trial are numerous and various, there are some standard methods of preserving points for appeal. Following are ten "commandments" to keep in mind when trying your case.

FIRST: WHEN POSSIBLE, SUBMIT YOUR POSITION IN WRITING.

Obviously, if you state your position in writing and file it with the clerk of court, it reduces questions about whether it is preserved. For this reason, it is a good idea to submit your arguments and objections in writing, when possible. For example, consider doing the following:

· File Written Motions In Limine Before Trial.

· At the Beginning of Trial, File A Trial Brief That Outlines Your Case.

· File Short Trial Memoranda On Unexpected Issues That Come Up During Trial.

· File a Written Brief Stating Your Position With Respect

To a Rule 50 Motion For Judgment as a Matter of Law.

· In Addition To Submitting Your Requested Jury Instructions In Writing, File Written Objections to the Instructions That Are Given.

· Use Both the Broad Brush and Fine Point Pen When Presenting Your Case.

SECOND: FOLLOW UP MOTIONS IN LIMINE WITH NECESSARY OBJECTIONS AND PROFFERS OF PROOF.

Motions in limine are a good idea because they raise issues before the heat of battle when they can be decided outside the presence of the jury. Often, however, litigants fail to follow up after an adverse ruling to preserve their objections for appeal. This is an easy mistake to make because one would think that a party's position should be preserved if stated in a brief filed in connection with a motion in limine. In most federal circuits, however, the motion is not sufficient to preserve your objection. If the district court denies your motion in limine, you should object to the evidence when it is offered at trial to make sure that you preserve the issue on appeal. *See Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1503-04 (11th Cir. 1985). *Cf. Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999) (motion in limine is sufficient to preserve objection where there is a definitive pretrial ruling). Further, if the district court grants your motion in limine but the evidence nonetheless comes in at trial, you must renew your objection at trial in order to preserve the issue for appeal. *See Collins v. Wayne Corp.*, 621 F.2d 777, 785-86 (5th Cir. 1980). If the district court grants your opponent's motion in limine, you should make a proffer of evidence unless the substance is readily apparent from the context of the court's ruling. *See* F.R.E. 103(a)(2).

THIRD: BE POLITE – BUT NOT BASHFUL – IN MAKING OBJECTIONS.

If there is one particular subject on which trial lawyers and appellate lawyers disagree, it is whether to object during an opponent's closing argument. Many trial lawyers keep their silence even in the face of outrageous arguments out of concern that an objection will offend the jury. Then, when a disastrous verdict is rendered, they condemn the unfair tactics of opposing counsel. Without an objection at trial, however, even the most egregious

disastrous verdict is rendered, they condemn the unfair tactics of opposing counsel. Without an objection at trial, however, even the most egregious misconduct of opposing counsel will escape review by the appellate court. The advice of the appellate practitioner, therefore, is to go ahead and make the objection – during the closing argument – but in the most polite way possible. That way, you will preserve your objection for appellate review. Moreover, you likely will not make your position any worse off with the jury than it was before. If a jury is going to hold such an objection against you, it most likely has already made up its mind in favor of the other side anyway. You are better off buttressing your position for appeal.

The same view applies to other types of objections during the course of trial, beginning with voir dire and the opening statements. If faced with improper *and prejudicial* questions, evidence or conduct, be polite – but not bashful – in making your objections. A bench conference sometimes helps alleviate concerns over offending the jury. The bottom line, however, is that timely objections are critical to preserving your position for an appeal. Without a proper objection, there is very little chance of appellate review. Of course, if you are confident that the opposing counsel has not hurt your case, you do not need to make the objection.

It also is important to stay alert to the need for objections. For example, don't forget to object to deposition testimony that is read at trial. Your objections to such testimony in the pretrial order will not protect your position if they are never ruled on by the court. You should make sure that your objection is made during trial when the deposition is read unless it previously is preserved in the trial record.

FOURTH: MAKE SURE THAT EVERYTHING IS REPORTED.

You cannot appeal an incident that is not reflected in the record. It is very important, therefore, to make sure that the court reporter takes down everything that occurs of significance. This is not usually a problem during testimony. Sometimes, however, issues come up during a break. Be sure that the discussion is recorded or, at least, that a summary of the discussion is later placed on the record. Bench conferences likewise should be reported. Also, be sure to have the court reporter take down testimony that is presented by video deposition. It is a mistake to rely on a prior transcript because issues regarding editing can arise. The best thing is to have the courtroom reporter take it down as it is presented to the jury.

FIFTH: GET RULINGS.

It is not sufficient merely to make an objection or a motion in limine or motion to strike. In order to have something from which to appeal, the district court must rule on the point. Therefore, if you object during the examination of a witness, do not allow your opposing counsel to continue the examination until the court has ruled on your objection. If the court has taken a motion in limine under advisement and your opponent begins to offer the objectionable evidence, get a ruling on the point before the evidence is presented to the jury.

SIXTH: MOVE FOR A MISTRIAL WHEN A "CURATIVE" INSTRUCTION IS INSUFFICIENT.

Sometimes a court will sustain an objection after the damage has been done, as for example, after the witness has answered the improper question or after the jury has heard the improper closing argument. In such a circumstance, you have two available remedies: you can ask for "curative" instructions or you can move for a mistrial. Curative instructions, however, generally are not thought to cure anything, except the chance for an appeal based on the incident. The jury has already heard the damaging statement and the "curative" instruction likely only will reinforce the jury's memory of it. Moreover, if curative instructions are given, the appellate court usually will find the instructions sufficient to prevent harm. If faced with a particularly damaging transgression, therefore, it is better to go ahead and move for a mistrial without seeking curative instructions. If the court suggests curative instructions, present it with the reasons why the instructions are insufficient to remedy the harm.

SEVENTH: USING YOUR ROADMAP AS A CHECKLIST, MAKE SURE THAT ALL OF YOUR EVIDENCE HAS BEEN ADMITTED OR PROFFERED BEFORE YOU CLOSE YOUR CASE.

You should not rest your case without making sure that all necessary evidence has been admitted or, if it was excluded, at least proffered. *See* F.R.E. 103. Your "roadmap" will help with this by providing a list of the essential elements of each cause of action and defense and the evidence that you are relying on in support of your position. You should check with the courtroom clerk regarding the admission of documents to confirm that your list of admitted exhibits is accurate and that you haven't missed anything.

If you are the plaintiff facing a motion for directed verdict and realize that you missed an important point, you can seek to reopen the evidence to remedy the omission. After all, one of the reasons behind the rule that limits a post-trial motion for judgment as a matter of law to the grounds advanced in support of the pre-judgment Rule 50 motion is that the plaintiff should have the opportunity to respond to the points made in the Rule 50 motion before the case is submitted to the jury. *See Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1289 (11th Cir. 1998) (instructing that Rule 50 was designed to protect a litigant's Seventh Amendment right to cure evidentiary deficiencies before the case goes to the jury).

EIGHTH: PRESENT EVERY POSSIBLE ARGUMENT THAT YOU HAVE TO SUPPORT YOUR POSITION ON A RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW

Your Rule 50(a) motion for judgment as a matter of law at the end of your opponent's case should be as inclusive as possible because you cannot prevail on a post-trial Rule 50(b) motion on any ground not raised in your initial Rule 50(a) motion, nor will an appellate court rule that you are entitled to judgment as a matter of law on a new ground not raised in connection with your initial pre-judgment Rule 50(a) motion. *See Ross*, 146 F.3d at 1289-90. *But see Rankin v. Evans*, 133 F.3d 1425, 1432-33 (11th Cir. 1998) (holding that technical non-compliance with Rule 50 requirements was excused where court and opposing counsel had actual notice of grounds for asserted deficiencies).

It is a good idea to prepare your initial pre-judgment Rule 50(a) motion and supporting brief early, if possible before the trial even starts, when you

It is a good idea to prepare your initial pre-judgment Rule 50(a) motion and supporting brief early, if possible before the trial even starts, when you have time to carefully consider the points. It then can be revised at the end of trial as needed to reflect the actual evidence that was admitted. Usually, the legal arguments will remain the same and the evidence will not vary much from what you anticipated. Also, incorporate by reference into your Rule 50 motion any points that you made in pretrial motions as well as any other written submissions such as objections to requested jury instructions.

When making your initial Rule 50 arguments, try to be both general and specific. State your proposition in a general manner and offer specifics as examples without limiting the argument to the specifics offered. Sometimes a general argument is deemed broad enough to preserve an interrelated concept that is explained more thoroughly for the first time in post-trial motions or on appeal.

NINTH: IF YOU FAILED TO INCLUDE A LEGAL THEORY IN THE PRETRIAL ORDER, MOVE TO AMEND THE PLEADINGS PURSUANT TO F.R.CIV.P. 15(b).

As mentioned earlier, the pretrial order supersedes the pleadings and is meant to control the trial of the case. Sometimes evidence relating to an omitted theory is nonetheless admitted at trial. If so, the omitted legal theory can be redeemed through a motion to amend the pleadings to conform to the evidence pursuant to F.R.Civ.P. 15(b). This rule provides that even when the evidence has been objected to at the trial on the ground that it was not within the issues made by the pleadings, the court shall freely allow the pleadings to be amended. At the very least, a Rule 15(b) motion will enhance the chances of appellate review of the omitted legal theory.

TENTH: OBJECT TO ANY IRREGULARITIES APPEARING IN CONNECTION WITH THE JURY INSTRUCTIONS, THE JURY'S DELIBERATIONS OR THE FORM OF THE VERDICT.

It is well established that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." F.R.Civ.P. 51; *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1934 (11th Cir. 1997). You should make sure, therefore, that the record reflects your objections to the jury instructions and that your grounds for objection are clearly stated. Otherwise, you will be deemed to have waived your objection on appeal unless the very narrow plain error doctrine applies.

The form of the verdict often does not receive the attention that it deserves. Usually, it is discussed at the end of the trial when the parties and the court are worn down by other battles that precede it. The form of the verdict, however, sometimes provides an easy ground for reversal. For example, in the Eleventh Circuit, a general verdict will not stand if any of the theories presented to the jury were defective. *See Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1055 (11th Cir. 1994); *Grant v. Preferred Research, Inc.*, 885 F.2d 795 (11th Cir. 1989). On the other hand, a special verdict form sometimes runs the risk of producing an inconsistent verdict that cannot stand. These issues should be thought through in advance of trial and you should be prepared to address them if the court decides to submit the case on a verdict form that could cause problems. If you fail to object on the record to the form of the verdict before the jury is released, you will be deemed to have waived the objection. *See United States v. Mitchell*, 146 F.3d 1338, 1342 (11th Cir. 1998); *Landsman Packing Co., Inc. v. Continental Can Co.*, 864 F.2d 721, 726 (11th Cir. 1989).

Similarly, you should state on the record all objections to the handling of jury questions during deliberations. To do so, make sure that every juror communication is taken down by the court reporter, and that your position on the communication is presented to the trial court at a time when it can remedy the concern.

Please keep in mind that this list of "ten commandments" is not meant to be a catalog or exhaustive list of necessary objections. Always stay alert to possible error and think about whether there is anything that you need to do to make sure that your position is adequately reflected in the record.

D. Use Post-Trial Motions To Clean Up The Record.

Of course, you should do everything possible to state your position clearly on the record during trial. Sometimes, however, a point will hit you after the trial is over. If you are in the unfortunate position of trying to salvage your case through a post-trial motion, consider whether the "new" point is related to one of the general points asserted during trial. Often arguments at trial are in need of further clarification and elaboration. There is nothing improper about explaining a concept further in a post-trial motion using new authorities, examples or closely related arguments. *See National Indus. Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549-50 (11th Cir. 1986). Post-trial motions are useful for "cleaning up" the record to make sure that you have properly explained your legal theories. One thing is for certain. It is better to make the argument in the post-trial proceedings than to raise it for the first time on appeal.

E. Carefully Review The Record On Appeal And Move To Supplement With Intervening Or Omitted Material.

The appellant is responsible for ordering the transcript. If the appellant does not order the entire transcript, the appellee has the opportunity to request that the entire transcript be included on appeal. Of course, it is safer to have the entire record included.

After the clerk has finished compiling the record on appeal, the district court clerk's office transmits an index of the record to the Court of Appeals with a certificate of readiness which is sent to counsel. Counsel should carefully review the record index to make sure that all items filed in the district court are included in the record on appeal. Sometimes the clerk's office does not include a filing, such as a letter to the judge, in the record index. Also, it sometimes is unclear whether exhibits to a filing are in the record on appeal. If in doubt, consider paying a visit to the district court clerk's office to inspect for yourself the way that the record on appeal is put together. Then, if you discover that a filing has been omitted from the record on appeal, you can move to supplement the record.

Occasionally, there is an intervening development that comes up after the trial that is proper for inclusion in the record on appeal. If so, the rules

Occasionally, there is an intervening development that comes up after the trial that is proper for inclusion in the record on appeal. If so, the rules provide for a method of supplementing the record on appeal to include such matter.

It is important to remember that appellate review is limited to the record before the appellate court. Take every measure, therefore, to make sure that all of your legal arguments and supporting materials are contained in the record on appeal.

III. THE VERDICT HITS: BUSINESS CONSIDERATIONS FOR IN-HOUSE COUNSEL

This section addresses some immediate business considerations flowing from a substantial adverse verdict. Because the rules of the different states can vary greatly, the focus will be on federal practice and procedure.

A. Stays.

Under Rule 62(a) of the Federal Rules of Civil Procedure, there is an automatic stay for 10 days after entry of the judgment. In addition, under Rule 62(b), the court on motion and in its discretion may stay enforcement of the judgment while a motion for new trial or to alter and amend the judgment is pending. A stay pending appeal, however, typically must be accompanied by a bond. *See* F.R.Civ.P. 62(d). A defendant is entitled to a stay pending appeal as a matter of right when it posts a supersedeas bond. *See United States v. U.S. Fishing Vessel Maylin*, 130 F.R.D. 684 (S.D. Fla. 1990). *See also Celotex Corp. v. Edwards*, 115 S.Ct. 1493 (1995) (posting a supersedeas bond prevents enforcement of the judgment until the appeal is decided) .

Although Fed. R. Civ. P. 62(d) provides that an appellant may stay the proceedings to enforce a judgment by giving a supersedeas bond, "a bond requirement may be waived in a court's discretion." *United States v. Certain Real and Personal Property Belonging to Hayes*, 943 F.2d 1292, 1296 (11th Cir. 1991). *Accord Prudential Ins. Co. of America v. Boyd*, 781 F.2d 1494, 1498 (11th Cir. 1986); *United States v. Route 7, Box 7091, Chatsworth, Georgia*, 1997 WL 412477 (N.D. Ga. 1997); *United States v. 2204 Barbara Lane*, 1992 WL 104387 (N.D. Ga. 1992).

The Court may consider the following five criteria when exercising its discretionary authority to waive a bond:

1. The complexity of the collection process;
2. The amount of time required to obtain a judgment after it is affirmed on appeal;
3. The degree of confidence that the district court has in the availability of funds to pay the judgment;
4. The losing party's ability to pay the judgment; if the losing party has vast resources to pay the judgment, the cost of a bond is a 'waste of money;' and
5. The losing party's financial situation; if the party's situation is precarious, payment of the bond might place other creditors of the party in an insecure position.

U.S. v. Route 7, Box 7091, Chatsworth, Georgia, 1997 WL 412477 at *2 (*citing Dillon v. City of Chicago*, 866 F.2d 902, 904-05 (7th Cir. 1988)). *See also Texaco Inc. v. Pennzoil Co*., 784 F.2d 1133, 1138 (2nd Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987).

For example, some courts have waived the bond requirement when the judgment debtor clearly has the ability to pay, or when the judgment is so large that the bond may prejudice the debtor's other creditors. *See Olympia Equipment Leasing Co. v. Western Union Tele. Co.*, 786 F.2d 794, 796 (7th Cir. 1986).

If a supersedeas bond request is granted, the amount of the bond ordinarily is the amount of the judgment plus interest. The court, however, has discretion to order alternative security as necessary to protect the rights of both the judgment creditor and judgment debtor. *See Curtiss-Wright Corp. v. General Elec. Co.* 446 U.S. 1, 13 n. 3 (1980); *Prudential Ins. Co. of America v. Boyd*, 781 F.2d 1494 (11th Cir. 1986).

If the trial court rejects a request for a stay or is unreasonable with respect to the bond requirements, the appellant may seek a stay from the appellate court under Rule 8 of the Federal Rules of Appellate Procedure. Before requesting the appellate court to stay, however, the appellant must first request the relief in the trial court or show why it would be impracticable to do so. There are constitutional limitations upon a court's power to impose an excessive bond pending appeal. *See In re American President Lines, Inc.*, 779 F.2d 714 (D.C. Cir. 1985).

B. The Bond.

A stay by supersedeas bond under Fed.R.Civ.P. 62 does not become effective until the bond is approved. Generally, supersedeas bonds may be secured in a number of ways including:

- Cash
- Government bonds
- Property
- The guaranty of a corporate surety authorized to do business in the state where the federal district court is located

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Moreover, some local rules impose additional requirements on the bond process. For example, Local Rule 65.1.1 of the Northern District of Georgia provides that "[t]he clerk shall approve as to surety all bonds requiring approval." With respect to bonds for costs, the local rule provides that the bond must have as surety either a cash deposit equal to the amount of the bond, a corporation authorized to execute bonds under 31 U.S.C. § § 9304-08, or an individual within the district with sufficient property to pay the bond amount and collection costs.

The surety on a supersedeas bond is liable for the bond amount if the appellant loses the appeal and fails to pay the judgment. *See Celotex Corp. v. Edwards*, 115 S.Ct. 1493 (1995). If the damages are determined on appeal to exceed the bond, the surety is usually liable only for the amount of the bond. *See Tennessee Valley Authority v. Atlans Machine & Iron Works, Inc*., 803 F.2d 794 (4th Cir. 1986).

If a party ordered to post a supersedeas bond does not do so, its appeal may still proceed. It simply lacks protection against execution on the judgment pending appeal. *See In re American President Lines, Inc*., 779 F.2d 714 (D.C. Cir. 1985); Michael E. Tigar, Federal Appeals § 6.11 (1999).

Under Rule 39(e) of the Federal Rules of Appellate Procedure, if the appeal is successful, the appellant can recover the expense of the supersedeas bond as a taxable cost in the district court upon remand.

C. Required Disclosures.

One very important immediate concern when a large verdict hits is the question of what disclosures must be made, and to whom they must be made. Obviously, internal notification must be made promptly. In addition, all notifications required by insurance coverage and loan agreements must be strictly observed.

It is also important that disclosures be made as required by the securities laws and accounting standards to avoid additional liabilities. *See Wilson v. Great American Industries, Inc.*, 855 F.2d 987 (2d Cir. 1988); *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A*., 1996 WL 680265 (S.D.N.Y. 1996). For example, a verdict may be sufficiently material and non-routine to require disclosure in an annual or quarterly report, prospectus, proxy statement, form 8-K, notification to an exchange, or press release. In addition, if the company has any pending deals, disclosures might need to be made to the other party to avoid breach of warranty. *See Goodman Mfg. Co., L.P. v. Raytheon Co.*, 1999 WL 681382, * 13-14 (S.D.N.Y. 1999).

IV. THE APPEAL: HOW TO MAXIMIZE YOUR CHANCES OF REVERSAL THROUGH EFFECTIVE APPELLATE ADVOCACY

Following are some pointers on effective appellate advocacy, first from an appellate practitioner and then from a federal appellate judge. These "helpful hints" offer practical advice on ways to improve the written and oral presentation of your appeal.

A. Advice From An Appellate Practitioner

1. Include an appellate practitioner on your team.

It is extremely advantageous to include an appellate practitioner on your team early to assist with issue spotting and to ensure that you do not waive any appellate rights. The issues that are best for an appeal often are not the same ones that received the most attention at trial. It is helpful to have a fresh "set of eyes" review the transcript and provide an analysis that focuses on issues likely to interest an appellate court. If possible, consult with the appellate practitioner periodically through the life of the case. At a minimum, you should have someone with this background look at your case immediately after receiving an adverse jury verdict because of the critical role that post-judgment motions play in shaping the appeal.

Further, because there are numerous traps for the unwary in the appellate area, someone well-versed in the technicalities of appellate procedure can make sure that you do not inadvertently waive arguments — or the appeal itself. For example, in one multi-million dollar case, the defendant lost its appeal entirely by obtaining an extension of time for filing its post-trial motion for judgment as a matter of law under Rule 50. Although the defendant filed its notice of appeal within 30 days of the denial of the motion, it was untimely because the motion itself was filed late — even though the extension was granted by the district court. An experienced appellate lawyer would have prevented this result by knowing that the time for filing a post-trial Rule 50 motion cannot be enlarged by consent or by court order.

2. Obtain advice on local practice.

Be sure that your team is aware of any peculiarities of local practice. Although there has been some recent efforts to standardize federal appellate practice, each circuit has its own local rules. Further, the local rules change frequently. The best way to make sure that you have the latest version of the local rules is to pull them off of the circuit's webpage. If you have a question about local practice, do not hesitate to call the clerk's office. Usually, the clerks are very helpful with answering procedural questions that are not specifically addressed by the written rules. Finally, once you find out who will be on your panel, research the backgrounds and opinions of the judges who will hear your case. It is entirely appropriate to ask a former judicial clerk about a particular judge's style and approach to cases, including the type of questions to expect at oral argument.

3. Insist on an early draft.

Even the most experienced appellate lawyer will need time to revise and polish the brief because every brief improves with skillful editing. The best editing occurs when the writer has the time to put the brief down for a few days to gain some distance from the work. It is a good idea, therefore, to set up a drafting schedule early, with specific dates for circulating drafts well in advance of the brief's due date. Keep in mind, however, that the first draft is a working document that is never as good as the final product. Do not expect perfection on the first round.

set up a drafting schedule early, with specific dates for circulating drafts well in advance of the brief's due date. Keep in mind, however, that the first draft is a working document that is never as good as the final product. Do not expect perfection on the first round.

After circulating the first draft, schedule a "roundtable" session so that all the members of your team can discuss the work. This can be done easily by conference call, if necessary. The roundtable can be helpful in focusing themes and in providing valuable feedback to the principal brief-writer. The actual drafting of the brief, however, should be left to a single, experienced writer. Brief-writing by committee usually results in a hodge-podge lacking the flow that is critical to effective written advocacy.

4. Consider these tips on successful briefing.

Following are a few classic tips on appellate advocacy. These points can be found again and again in books on legal writing and in articles authored by judges who read the briefs and decide the cases.

· *Avoid the shotgun approach*. If you ever are on the losing side after a lengthy trial, you no doubt will have a long list of errors that you think were harmful. The fact of the matter, however, is that appellate courts do not respond well to an appeal that presents numerous points for review. Your chances for reversal are actually increased if you select only a few well focused issues for consideration. As a rule of thumb, an appellant should raise no more than five points even after a lengthy trial. Two or three issues is ideal.

· *Develop a theme*: Your appeal should have a theme, which you should make clear from the beginning of your brief. Even when you are the appellee, you should take control of the issues and not merely rebut your opponent's arguments. Take advantage of every opportunity to promote your theme. For example, when requesting oral argument, elaborate on the request so the court will learn not just that you want argument, but also what the issues are and why your case is extremely important.

· *State issues in a manner that requires an answer in your favor*. A proper statement of the issues is critical. You should incorporate enough information into the statement of the issues to compel the conclusion that the court below erred and to suggest why. Be sure, however, that the issues are stated clearly. Avoid convoluted sentence structure that must be read more than once to be understood. Also, make sure that your principal headings correspond to your statement of issues. The major headings are simply the answers to the questions presented by the statement of issues. You should have the exact same number of major headings as you have issues, and the headings should state why the ruling to be reviewed constituted harmful error.

· *Use preliminary paragraphs*. Each section of the brief should have a preliminary paragraph to catch the interest of the reader and convey why the court should rule in your favor. This introductory paragraph should elaborate on the heading and summarize your particular argument. Like the beginning of a newspaper article, it should be presented with a broad brush, leaving the detail for the paragraphs that follow.

· *Use the statement of facts to tell a story*. There is nothing worse than a dry statement of facts that simply recites events in chronological order without regard to importance. While it sometimes is best to make a chronological presentation, this is not always true. You should use your statement of facts to tell an interesting story, to reinforce your theme and to make the reader sympathize with your case. Make sure the important facts are presented early. You will always have a chance to put them in further context in subsequent paragraphs.

· *Above all else, maintain your credibility*. Credibility is critical to an appellant because the tendency of any appellate judge is to affirm the rulings of a fellow member of the bench. So, be absolutely precise in your statement of facts. Back up every factual statement with a citation to the record. Where a piece of evidence is particularly important, quote from the document or testimony. Likewise, make sure that all the cases that you cite support the propositions for which you cite them. Use *short* quotations from the authorities to support critical points, but be sure that your point is independently stated in the text of the brief. Avoid overstating anything. In fact, understatement is much more effective because it focuses the court on the bottom line.

· *Avoid footnotes*. Those lawyers who were on law review boards in law school find it difficult to believe that briefs are better when they are not cluttered with footnotes. A brief, however, does not serve the same function as a law review article and judges consistently say that they do not like footnotes in briefs. Footnotes break up the flow and make work for the reader, who is forced to shift between thoughts and look for his or her place again after finishing the note. Further, it is a mistake to place important material in a footnote. If the point is important, it should go in the text where it will not be overlooked. If it is not important, it should be left out altogether.

· *Revise, condense, and distill*. Imagine a yard-high pile of briefs on your desk that you must read — one after the other. You would soon dread picking up those thick ones. The lighter ones, which are easier to get through, have a psychological advantage. Appellate judges are in precisely this situation, facing a never-ending pile of briefs. When it comes to effective appellate advocacy, therefore, shorter is better — particularly with respect to your opening brief. Your goal should be to make it easy for the court to see your point, and to grasp it quickly.

· *Use reply briefs effectively*. Often lawyers are tempted to use a reply brief to rebut every argument advanced by the appellee. The more effective approach, however, is to cut to the bottom line, if you can, showing that the appellee did not create an issue with respect to one or more of your key points, or that the appellee's arguments are not really relevant. As with your principal brief, make frequent use of record citations to reinforce your credibility and, where a critical point is concerned, to expose liberties that your opponent has taken with the record.

5. Budget for thorough oral argument preparation.

5. Budget for thorough oral argument preparation.

Oral argument does not sway the panel in every case, but it does in some. When you are appealing a large judgment, therefore, be sure to budget for a thorough oral argument preparation.

Even though the actual time allotted for argument is brief, the preparation required for argument is extensive. Usually, oral argument takes place months — or occasionally years — after briefing. It is important therefore, for counsel to re-read all relevant materials, including significant portions of the record, transcript and case law, as well as the briefs. Again, because credibility is so important to an appellant, counsel should not have to give "I don't know" as an answer to a question at oral argument.

Every conceivable question should be analyzed in advance. Moot courts are very effective for this purpose. Indeed, the most useful moot courts are those where some of the "judges" are lawyers with no prior information about the case because they will be in the same position as the judges who will decide the case.

B. A View From The Bench

Appellate Practice "Helpful Hints"

Judge Birch's Appellate Practice "Helpful Hints" was originally prepared several years ago, after consultation with his colleagues, for a meeting of the Litigation Section of the Atlanta Bar Association. Since that time, Judge Birch has distributed "Helpful Hints" as a handout in numerous presentations. These suggestions continue to provide sound advice for effective appellate advocacy.

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By Hon. Stanley F. Birch Jr.

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1. **Preserve your record by making a proffer, objection, or motion at trial.**

2. **Keep it short; The length of a brief does not determine its quality.** The brief should be written in a straightforward manner. Relevant case law should be cited, preferably case law binding in this circuit. Cases not binding in this circuit need not be cited unless there is no applicable precedent in this circuit, or unless the nonbinding case is more analogous factually and analytically. Do not use five words where two will suffice; do not use a "two-dollar word" where a "ten-cent word" is adequate and more understandable; and avoid string cites. Get to the point, make your argument, and draw your conclusion. Remember that weak arguments may detract from stronger ones, so be wary of including every conceivable argument. Using the "shotgun" approach could cause you to "shoot yourself in the foot" (or worse).

3. **In the Table of Authorities, place an asterisk (*) in the left margin next to those cases upon which principal reliance is placed and so note at bottom of the page.** Although not dictated by any format, you may wish to place parenthetically after each citation the issue number, corresponding to the issue in your Statement Of Issues, to which that case is applicable.

4. **Realize the importance of the Summary Of Argument section of your brief.** Many judges turn initially to this section of the brief. This section should be written after your argument sections are composed. Synopsize each of your arguments, preferably under brief sub-headings, in simple, straightforward sentences explaining the result that you desire and the reasons therefor. Do not cite cases unless you do so by footnote so as not to break the flow of your presentation.

5. **Emphasize the standard of review in arguments when it works to your advantage.** If the court of appeals can reverse for abuse of discretion, or plain error only, *that fact is as important as the burden of proof in the district court.* In your briefs and at oral argument, remind the panel when the presumption to uphold the district court favors you.

6. **Refer to parties by name.** Throughout briefs, do not refer to the parties as "appellant," "plaintiff," "respondent," or any combination thereof. In the first paragraph, it is helpful to identify the appellant in relation to that party's position in the district court (plaintiff or defendant). Thereafter, it is confusing to refer to the parties generically.

7. **Record excerpts and accurate record cites are essential**. Many of the cases on appeal have voluminous records, and judges *will* read the record. Misstatements of the record are not appreciated and are detrimental to the misstating attorney's case. *Every material factual statement in a brief should be followed by a cite to the record*.

8. **Avoid rambling and unclear factual recitations.** Many cases involve complicated factual situations, such as interlocking companies or the functioning of industries unfamiliar to the court. Judges are not experts in every field, although they must decide technical cases. Attorneys assist the court in explaining factual circumstances in a coherent, understandable manner. Generally, a chronological recounting of the facts is the most logical method of presentation. It is imperative that the facts in any case be recited to the court accurately. You may argue the facts as you desire, by explaining motivation for certain actions, for example. An accurate recitation of the facts is necessary for a correct application of the law. Unexposed facts, particularly ones that may be determinative as to the law, can be as damaging to your case with the court as improper legal arguments.

9. **Never cite a case for a particular proposition unless that case actually supports your argument.** If an argument is taken out of context, or an irrelevant case is used merely to bolster an argument with some authority, a serious risk is run of destroying an attorney's credibility with the court.

9. **Never cite a case for a particular proposition unless that case actually supports your argument.** If an argument is taken out of context, or an irrelevant case is used merely to bolster an argument with some authority, a serious risk is run of destroying an attorney's credibility with the court. When an argument is novel or otherwise unsubstantiated, it is better to present that argument without authority. Use analogous cases with parenthetical explanations where appropriate. A questionable analogy may be a creative argument, while misrepresenting the holding of a case is indefensible and counterproductive. *While you may use inferences, please tell the court that you are so doing.* Do not take a quotation or argument out of context, use dicta, or rely on an inference that could jeopardize the court's view of a case. Judges look to counsel to provide accurate quotations as bases for their arguments. Do not be memorable to the judges for misleading the court on the governing law.

10. **Focus on the strongest argument(s).** Frivolous arguments should not be made because they weaken the attorney's position. The argument should be discussed clearly, concisely and persuasively without stretching the argument or the applicable law.

11. **An attorney should not ignore an argument raised by the other party.** The brief should address the other party's arguments and supporting cases cited therein. An attorney should demonstrate the reasons that an opposing argument is frivolous. If counsel finds an argument convincing, counsel should concede that point and focus on counsel's strongest argument(s). This will cause the reviewing court to respect that attorney's credibility.

12. **Proofread briefs carefully.** Typographical, grammatical, compilation (i.e., pages out of order, repeated, or not legible and spelling errors detract from your legal arguments. If an attorney is careless in the presentation of arguments, then he or she might also fail to be logical and thorough in legal reasoning and analysis. For example, one judge mentioned at oral argument that counsel had discussed federal and state "comedy" in his brief rather than "comity." All cases must be cite checked. Incorrect citations are annoying, particularly if volume and page numbers have been transposed, and are especially so when the case name also is misspelled.

13. ***Strictly* adhere to the form and page length requirements.** For example, the Eleventh Circuit Rules mandate that "[o]nly the cover page, the certificate of service, direct quotes, headings and footnotes may be single spaced. **All** other typed matter must be double-spaced, including the Table of Contents and the Table of Citations."

14. **Know the trial record.** In cases involving appeals from trials, it is likely that the judges will question counsel regarding proceedings at trial, such as whether a particular objection was made. It is unhelpful and frustrating to the court when the response to such a question is: "I am sorry, your Honor, I do not know. I was not the trial attorney." If someone other than the trial counsel is arguing the case, then he or she should be completely familiar with the trial transcript so that such questions may be answered. If a judge asks a question concerning the trial that is not apparent from the briefs, then that question is likely to be important in deciding the case. Therefore, it is important that it be answered for the court, at oral argument, or subsequently, with permission of the panel.

15. **Be prepared to answer questions**. An attorney arguing a case before a panel should be aware that most of counsel's allotted fifteen minutes generally will be spent responding to questions. When addressing a question, an attorney should answer the question directly and, thereafter, explain the response. Counsel should expect questions posed by the judges based on hypothetical situations. In response, explain the reasons for finding the hypothetical applicable or inapplicable. Panel questions usually are straightforward because the judge has a particular problem with the facts or your legal argument. An evasive response gives the impression that you are being less than candid. The astute attorney should realize that the judge asking the question actually is helping the counsel by directing him to the aspect of his or her case that is troubling for the judge. by clarifying that point for the inquiring judge, counsel benefits his or her case appreciably by addressing a fact or applied point of law that may be decisive.

16. **Sarcasm and indignation are not substitutes for hard and cold logic.**

17. **Discourage your clients from attending oral argument.** I have seen clients die the proverbial "thousand deaths" as the panel challenges and interrogates each party's counsel on the legal theories of the case. Why put your clients through such a proceeding where legal issues predominate?

18. **The appellee should be aware of all grounds supporting the district court's favorable ruling on summary judgment.** Because an appellate court can affirm the grant of summary judgment on any ground argued before the trial court, an appellee should always address the presented, but unruled-upon grounds as well as the grounds relied upon by the trial court.

The Hon. Stanley F. Birch jr. is U.S. Circuit Judge for the Eleventh Circuit. He received a B.A. from the University of Virginia and a J.D. and Master of Laws in taxation from Emory University School of Law. Judge Birch is a former member of the State Bar of Georgia Board of Governors.

V. THE COURT OF PUBLIC OPINION: PRACTICAL CONSIDERATIONS FOR MANAGING PR ISSUES

A. The Judicial System And Court Of Public Opinion Are Biased Against Corporations.

"Corporations are guilty until proven innocent."

For a corporation the maxim "innocent until proven guilty" is a misnomer. In fact, just the opposite is true. The judicial system and legal process is designed to protect the public and compensate victims. Only rarely does the public, the media or the legal system view corporations as victims. The first reality corporate counsel need to recognize and overcome is that the news media, the legal system and the public tend to look at corporations with suspicion. The case will be tried in the court of public opinion long before it is tried before a jury.

Corporations assume that if they can just get the facts out, the public, the media and the courts will understand and appreciate their position. Unfortunately, much more needs to be done to get a company's message out. Communicating the company's side of the issue will contribute not only to a successful outcome in court, but also provide an opportunity to offset adverse publicity generated by the case.

B. Be Strategic With Community Relations And Corporate Contribution Programs.

"There is no such thing as a jury of one's peers for a corporation."

Companies that will fare best after a runaway verdict are those that have already assumed that, at some point in time, a crisis is inevitable and have planned accordingly. Consequently, begin impacting the court of public opinion before the verdict, before the trial and even before the event which resulted in the trial occurs.

Madison Avenue likes to say, "image is everything." Jurors are inevitably colored by their previous knowledge of a company, however slight. Therefore, it is important to treat your community and marketing communications programs as additional strategic tools that build a company's image in the community. Being perceived as a good corporate citizen can pay dividends in the courtroom and, more importantly, once the jury beings deliberations. The difference between a $10 million verdict and $100 million verdict could hinge on how long, to what extent, and how effectively a company is perceived to have contributed to the community.

A corporation's reputation is built over time by contact with customers, shareholders, the media, employees and the public. Consider your reputation to be a bank account and make regular deposits over time. This will enable the corporation to have something to draw on before the trial begins. There is no such thing as a balloon payment after the trial begins.

In addition to monitoring relevant legal trends in an effort to anticipate the company's next possible crisis, also monitor community trends to anticipate where philanthropic and corporate sweat equity might be used to their best advantage in the event a crisis and subsequent litigation develops. Jurors are seldom platinum members of the museum of contemporary art, yet a large portion of corporate dollars go to such causes, worthy all, instead of causes which impact the average person who is much more likely to sit on a jury. Focus on areas that are socially and economically disadvantaged. Not only will you really help those in need, but also help the company in the event litigation occurs. This will also create the collateral benefit of developing friends and allies who may carry your message for you — people who have come to understand and appreciate your company and want to help because the company has helped them in the past. This pro-active approach to managing the public relations implications before a case is ever filed will pay dividends after the jury has been sequestered.

The plaintiffs bar has been very successful at this approach for years. They use their friends in the advocacy community, government and the media to tee up their litigation and bring pressure to bear that will force settlement and win cases. Corporations need to rethink how they approach litigation and take a much more holistic approach, making friends and building alliances before they are needed.

C. Consider A Litigation Community Relations Audit.

"How to win friends and influence people."

Anticipate where litigation might arise and consider inoculating the company by creating a positive image of the company and its practices. Analyze the sources of current and possible litigation and develop strategies that will improve the company's likelihood of success in the event litigation occurs. Try to develop a strategy designed to make trial lawyers less likely to view the company as a potential target. Plaintiff's counsel, like sharks, recognize that it is easier to attack a company that is weak or wounded that a company this is strong. Corporate counsel know where the corporation is most vulnerable. Work to address those issues and, where geographically feasible, begin paying more attention to those areas with your philanthropic and community relations programs.

Identify key audiences and constituencies — customers, employees, shareholders, suppliers, the media and the public. Begin to massage those areas to create a more positive perception of the company's practices in those areas among those key audiences. Consider how you can get ahead of the curve, so that before a suit is filed the company has already positioned itself in the most favorable possible way. While Madison Avenue may call it image building, corporate counsel should view it as risk management — a way to reduce legal vulnerability and protect the corporation's reputation.

D. Create A Litigation Communications Team.

"Be prepared."

Create a team to implement the actions necessary to address the findings of the community relations audit. This team should work closely with in-house counsel to head off future litigation, manage any crisis that occurs and any subsequent litigation.

The litigation team should consist of in-house counsel, corporate communications, risk management and community relations representatives. The team should be equipped with professionals who can address key constituencies like the media, community activists, opinion leaders and government officials. This team should be a natural outgrowth of the company's crisis communications team. The team should be well trained and regular crisis drills should be held to check internal systems and keep the team on "ready".

Companies that take the initiative and try to control events rather then allowing events to control them will fare better then those who

Companies that take the initiative and try to control events rather then allowing events to control them will fare better then those who merely respond when one of the aforementioned constituencies calls.

E. Litigation Communications Begins When A Crisis Occurs.

"Remember what your mother told you — always tell the truth."

The initial response to a crisis is very important. Failing to respond quickly to charges made or carried by the media is perceived as having something to hide. Liability will be decided years later in a court of law. Judgements about the company's integrity and reputation will be decided by the public at the time of the event. The tactics of litigation public relations must be used immediately or the company will risk losing the battle before the first legal shot is ever fired.

Many managers make the mistake of trying to deny the existence of a crisis, or defend its implications with less than full disclosure. The key to public relations, however, is candor and complete disclosure. If a company knows there really is a problem, it should say so, and then discuss how it is dealing with the situation. Acknowledge the consequences of any wrongful behavior on the part of the company or its employees, and show the public that the company and its employees share their concerns. The potential for high stakes litigation and the litigation itself usually create a combative attitude among senior executives and litigation counsel. Remember to temper this attitude because it can cause long-term publicity problems. Spending money early to get your message out and to help any victims may be costly. However, it is much cheaper then recovering your reputation. That will be expensive, and sometimes simply not possible.

When a crisis strikes, it is a mistake to treat is as if mere legal principles are involved. While anything the company or its employees says may impact anticipated litigation, it also presents an opportunity to begin to mange the litigation public relations. A litigators first instinct is usually to muzzle communications. However, corporate counsel need to think more globally. The preservation of a corporation's credibility and perhaps even survival in the marketplace may turn on the company's capacity to tell the truth, admit fault, and even go the extra mile to make amends. Corporations can take responsibility without taking blame. This tempers media speculation and a string of stories on how the crisis happened. Act responsibly, a company can always argue the law later. In other words, be a good neighbor. Remember, neighbors sit on juries.

An effective crisis plan and crisis team can take the initiative, control events, and go a long way to minimizing the adverse consequences of a crisis and the inevitable litigation that follows. The ability to recognize potential litigation before it occurs; to deploy the resources necessary to soften any litigation and establishing a team that can meet the challenge quickly and react in a cohesive, responsible and caring way can go along way to minimizing the runaway verdict.

F. Litigation Public Relations Should Be An Integral Part Of The Litigation Strategy.

"Effective litigation PR should be viewed as another weapon in the legal arsenal."

Litigation public relations is telling a persuasive story in a manner that allows the facts to be heard above the confusion and complexity of a lawsuit. Jurors, judges, politicians, customers, investors and employees all read newspapers and listen to television and radio news broadcasts. The plaintiffs' bar knows this all too well and for years has effectively used litigation public relations to influence the judicial process.

Even cases before the grand jury, which are supposed to be secret, find their way into the media.

For the corporation, winning the public perception struggle can be very difficult. It is impossible when the corporation sticks its head in the sand. To the average person the words "we do not comment on pending litigation" sounds suspiciously like "we're guilty and we don't want to pay." It is imperative that company's communicate their side of the case in order to minimize the adverse verdict and, sometimes more importantly, offset the adverse publicity and damaged reputation generated by the case.

Increasingly, legal battles are being fought, and won, in the court of public opinion, long before the case ever gets to trial. In fact, companies can win in court, but lose in the court of public opinion. The communications strategy, to be effective, should maintain the positive positioning of the company before, during and after the trial or settlement. Effective implementation of such a strategy should achieve a balance in the information being reported before suit is filed, during the litigation and throughout the appeals process. Remember, the most consequential verdict often takes place outside the courtroom.

Litigation public relations should support the legal strategies developed by counsel and effectively communicate them to key constituencies outside of the courtroom. The goal should be to establish or maintain corporate credibility and create a critical mass of opinion on the company's behalf. The interplay between perceptions inside and outside the courtroom is readily apparent in the current Microsoft antitrust case.

G. Key Components Of A Litigation Communications Strategy.

"Develop a message strategy for each phase of the trial."

1. Integrated Strategy Essential.

The communication strategy surrounding the litigation should be tailored to and support the litigation strategy. The first rule of thumb is that

The communication strategy surrounding the litigation should be tailored to and support the litigation strategy. The first rule of thumb is that any public relations surrounding the case should "do no harm". The litigation communications, regardless of the vehicle used to convey it, should enhance the legal theories, create clarity of message and work to control the story. To be effective, however, it must be part of an overall, coordinated, comprehensive communications campaign.

2. Jury, judicial and opinion research.

   The research done on the potential venire and judge should be coordinated so that legal theories and communications strategies converge. The litigation communications team should work together with counsel to develop and test effective messages. This should include translating legal jargon into language understood inside and outside the courtroom. Indeed, the most effective legal theories should also resonate with the public, the media, the government and opinion leaders.

3. Tailor tactics to achieve victory inside and outside the courtroom.

   a. Media Relations.

· *Earned media.* It is important to identify your audience. It will include jury/venire, the media, opinion leaders and the general public. By working directly with reporters, editors and producers, the company's message can be conveyed to the public instead of sitting back while the prosecutor or plaintiff's attorney only gives their side of the case. Even the most modest pre-trial publicity can prejudice potential jurors. Factual publicity can play an important role in biasing potential jurors by providing negative information about the company.

In fact, many would say the clear plaintiff bias in civil cases and the prosecution bias and criminal matters, undermine the judicial process. Therefore, litigation communications requires messages be carried through mass media to target audiences and the public. Public opinion has long been a powerful ally for prosecutors and plaintiff's attorneys. Corporate defendants cannot sit idly by while the case is tried in the media and the corporation's reputation is destroyed before the trial begins.

The court of public opinion is a different arena from appellate or trial work. Talking to the media is not like talking to a judge or jury. Different techniques must be mastered for delivering a company's message in the modern media environment. Media training for counsel is imperative, even if the choice is to use a public relations or company representative as a spokesperson. Who to use as a spokesperson is an important consideration. Having a place to refer media calls is essential. Depending on the gravity of the case, a senior official of the company should be considered. While media calls can be managed by company spokespeople, press releases should quote company officials, perhaps even the CEO or General Counsel. Decisions will need to be made whether to have trial counsel available to the media or just available on "background".

Consider how your spokesperson looks to the public and your key constituencies, judge, jury/venire, community, government officials, opinion leaders. Talking like a business person can sometimes mean talking like someone who cuts jobs and is more interested in the bottom line than the health and safety of its workers.

The moment you feel progress is being made with various audiences and constituencies, some negative fact or allegation surfaces that you must rebut. Your reputation, it seems, is only as good as the last negative allegation.

Be proactive with earned media. News releases, news conferences, video and audio news releases are all vehicles to consider using as a way to get your message out.

When the runaway verdict is rendered, brief senior managers immediately and then get with the press before they come to you. In the event of a dismissal or defense verdict, the company's name may appear in the resulting story, but seldom is the story complete enough to repair the damage of negative publicity. Therefore, if the company wants to tell the story of your vindication, the company will have to do it.

· *Paid media*. Developing advertisements and "advertiorials", can take the company's message directly to the public without a reporter's bias or producer's filter.

- *Internet*.

Advocacy groups supported and utilized by the plaintiffs' bar have their own web sites. Consider harnessing the power of the Internet to reach the broadest possible audience. Consider using your own company's web site or a link to another site. Some cases have even had their own web sites.

   a. Third-Party Allies and Grassroots Support.

   · *Develop Third-Party Allies*.

   When it comes to the court of public opinion, you can never have too many visible friends. Reporters and producers often take their queues from outside groups and individuals. By building bridges before the trial ever begins you can develop third-parties who can be sources of affirmation for your side and convey the true character of your company.

   · *Grassroots Support*.

   Consider developing a groundswell of public support. It can create a favorable image and profoundly affect the media coverage of the trial.

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b. Don’t forget investors and the financial community.

High-stakes litigation and runaway verdicts can spook investors and financial analysts. Give them the facts and let them know you have directed the appropriate resources to address the issue. Have your investor relations' people brief analysts and consider having counsel available to answer any questions, if warranted.

c. Employees — Important Allies.

Communication between management and employees about high profile cases that may garner significant media attention should be prompt, preemptive, candid, effective and informative. Keep employees updated as soon as you feel information will go public. Use e-mail and blast faxes to keep employees advised. Make it a point that your employees hear the news from you first, with your analysis, before they hear it from the media. In addition, Employees can be excellent allies. As they interact with their community they can provide effective grassroots support.

d. Keep the Board Advised.

At the first sign of potentially problematic litigation the board should be given a report on the development of the matter. It should be furnished periodic updates by confidential memoranda or at board meetings.

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